SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 1076

JACKSONVILLE PAPER COMPANY, A CORPORATION,
Petitioner,

v.

THE UNITED STATES.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

We have lately inquired of West Publishing Company and received the information that the opinion of the Court of Customs and Patent Appeals has not been reported for printing, but a copy of the opinion handed down March 1st, 1943, now appears as part of the complete Transcript of Record as certified by that Court.

Jurisdiction.

The basis of this Court's jurisdiction has been previously pointed out in the foregoing petition and is primarily based upon 28 U. S. C. A., Section 308, together with Rules 42 and 38 of this Court.

Matters Involved.

The first section of the foregoing petition states the three primary matters involved and then gives an explanation of each, hence there need be no repetition in this supporting brief.

Assignments of Error.

1. The United States Court of Customs and Patent Appeals erred in undertaking to reverse the Customs Court on the latter Court's findings of facts relating to the subject of duress when it clearly appears that there was ample substantial evidence to support the findings of the Customs Court.

2. The Court of Customs and Patent Appeals erred in so construing 19 U. S. C. A., Section 1503 (a) (b) as to hold that the "entered values" here in question were not made under duress because the importer could have made "duress entries" even though the conditions named in the Statute for the making of such duress entries did not exist.

3. The Court of Customs and Patent Appeals as also the Court of Customs erred in holding that neither of said statutory courts had power under the provisions of the Tariff Act of June 17th, 1930, to give the petitioner as importer any relief for excess moneys paid to Customs officials under duress imposed by such officials.

ARGUMENT.

Point I—The Court of Customs and Patent Appeals was without authority to weigh the evidence produced by the parties before the Customs Court and thereupon reverse the findings of fact made by the latter court on the subject of duress and other related questions, findings as to which were made by the Customs Court.

The case of *McCaughn* v. *Real Estate Land T. & T. Co.*, 297 U. S. 606, 80 L. Ed. 879, 881, clearly sustains this point.

The Court of Customs and Patent Appeals has in several cases held itself bound by the same rule. *May Company* v. *U. S.*, 17 Ct. Cust. & Pat. App. 190. *U. S.* v. *Wheeler, Elder & Elder*, 17 Ct. Cust. & Pat. App. 279. *U. S.* v. *Allenby & Co.*, 20 Ct. Cust. & Pat. App. 80. In the cases at bar, however, the Court of Customs and Patent Appeals did not abide by the settled restriction above pointed out.

Counsel for the United States by Point I of brief filed in the Court of Customs and Patent Appeals contended

> "The finding of the lower court that the customs officials coerced appellant is against the weight of evidence."

Counsel for the United States then proceeded to make his own analysis of the evidence given before Judge Kincheloe of the Customs Court and contended that on account of lack of experience and misunderstanding of the law on the part of petitioner's president and auditor their positive testimony should be discounted and the greater weight given to the contradictory testimony of the deputy collector, Mr. Bobbitt and of the acting appraiser, Mr. Diamond. The Court of Customs and Patent Appeals followed the line of reasoning proposed by counsel for the United States and arrived at the conclusion now found on the next to the last page of the opinion:

> "Owing to the fact that we do not find that there was any duress in this case, it is unnecessary to discuss the principles announced in those cases." (Meaning *Maxwell* v. *Griswold*, and other decisions by this Court.)

The Court of Customs and Patent Appeals, like counsel for the United States, undertook to find and conclude that the president and the auditor of petitioner were simply misinformed as to the law and misunderstood what the Customs officials tried to explain. That sort of conclusion is not

justified by the record. The Customs Court by its opinion (bottom R. 83) said:

> "They (meaning petitioner's president and auditor) testified unqualifiedly that they attempted to enter the goods covered by entry J-307 at the invoice prices which represented the export values of the merchandise, which values were afterwards found upon reappraisement to be the correct dutiable values of the paper, and the customs officers refused to accept entry on that basis but required them to enter the goods on the basis of foreign value under threat that otherwise the merchandise would be subject to the assessment of additional duties for undervaluation."

This shows the nature of the evidence given by petitioner's president and auditor and that they knew exactly what they were talking about. Not only so, but when petitioner's president was on the witness stand, as appears (R. 48), he explained about having written the Deputy Collector a letter under date of May 13th, 1936, explaining why petitioner contended for the export value or invoice value as the proper basis for the entries on these shipments. That letter was filed in evidence as Exhibit 5 and is shown (R. 71-72). It refers to the May shipment scheduled to arrive in Jacksonville about that date and proceeds to say that the letter was written as notice of protest pursuant to resolution formally adopted by the Swedish Paper Mills Association some weeks before the date of the letter. The letter then quotes a memorandum made up by that Association pointing out that there was no foreign market value for American importers because the Swedish home market was a controlled market. Therefore only the export value should be regarded as the proper dutiable value on importations to the United States. Nevertheless the record, as previously shown, is clear that the Deputy and his appraiser

made no report even on April shipments until June 5th, 1936, nearly a month after the date of this letter. By that appraisement, according to copy of notice which is included in the foregoing petition, the appraiser and the Deputy Collector ignored the information contained in the memorandum of the Swedish Paper Mills Association and still contended for an alleged foreign market value 24 per cent higher than the supposed foreign market value which they had required the petitioner to show by the entries as actually made before possession of the merchandise would be surrendered. That letter shows that the petitioner and its officers were fully informed of the correct basis and that they so advised the Customs officials but the Customs officials arbitrarily stood by their guns and continued to do so until they were reversed by Judge Keefe's decision in February, 1940, as now shown by his opinion (R. 66 to 69). In a further effort to support the Customs officials the Court of Customs and Patent Appeals, as appears by page 6 (R. 95) of that Court's opinion, said:

> "Mr. Bobbitt, in particular, gave testimony to the effect that Mr. McGehee was told respecting the matter of a 'duress certificate' at the time the April entry was under discussion."

There was testimony to that effect by Mr. Bobbitt but that again shows that he himself didn't have a clear understanding of the Tariff Act because he confessed that he knew nothing about any case pending on reappraisement until after August, 1936, and the proof shows that petitioner's president and auditor knew of no pending case. Therefore there was no pertinent basis for any discussion of a duress certificate. None was possible under the limitations imposed by the Statute. In any case it was not the province of the Court of Customs and Patent Appeals to thus undertake to

tear down and reverse the findings of fact made by the Customs Court and then use its own findings of fact as a basis for applying what that Court conceived the law to mean.

Under the facts as they existed and as they were found by the Customs Court, the petitioner as importer was subjected to "moral duress" as a result of which it was prevented from making entries at the correct export value which was also the invoice value, and the petitioner in effect was compelled to make an entry at the supposed foreign market value in order to get possession of its goods. This constituted moral duress within the meaning of this Court's decision in *Maxwell* v. *Griswold*, 10 How. 242, 255, and *Robertson* v. *Frank Brothers Co.*, 132 U. S. 17, 23. An entry made under duress is involuntary and the payment of duties on the basis of such an entry is involuntary, giving the importer a right to recover payments in excess of lawful requirements. *Maxwell* v. *Griswold, supra. Robertson* v. *Frank Brothers Co., supra. Sinclair Navigation Co.* v. *U. S.*, 32 F. (2d) 90, 61 Corp. Juris, pages 992-993.

Point II—The illegal "entered values" at the supposed foreign market values were voidable on account of duress and said entered values acquired no binding force on account of petitioner's omission to make "duress" entries when the conditions defined by Section 503(b) of the Tariff Act did not exist.

This is a restatement of Question II set forth and discussed in the foregoing petition.

The brief of government counsel filed in the Court of Customs and Patent Appeals, page 15, says:

> "It is immaterial whether either or both parties had such knowledge since appellant failed to file the necessary duress certificates."

On the next page of the same brief government counsel says:

> "Duress cannot be predicated on ignorance of the law notwithstanding anything a Government official may say or do."

We hope that this Court will see fit to render a decision in this case and if so, then both sides of this controversy will be better informed. As we now read Section 503(b) of the Tariff Act, a "duress certificate" can be made by an importer only if he knows of some case then pending on reappraisement or re-reappraisement. Such is the language of the Act. Moreover the Court of Customs and Patent Appeals in the case of *Bernstein* v. *U. S.*, 18 C. C. P. A. 460, expressly held that the importer must know at the time of making the duress entry that a case is pending on reappraisement similar to his own and the similar case must be specified in the duress certificate filed by him. Otherwise such a certificate is of no avail. Admittedly neither the importer nor the Customs officials knew of any pending case and this was stated as an undisputed fact by the opinion of the Customs Court (R. 88, lines 2 to 5). Again, as previously pointed out, the petitioner was not able to create any appeal as to its own shipment of April 17th, 1936, until after June 6th, 1936, for the simple reason that not until the latter date did the petitioner receive statutory notice of appraisement provided for by Section 501 of the Tariff Act. The petitioner did take an appeal with respect to the April shipment on June 23rd, 1936, but before that time the petitioner had been subjected to the moral duress of the Customs officials with respect to the April shipment, the May shipment and the June shipment (see dates of entry on these three shipments, R. 14, R. 18 and R. 20). The excess payments required of petitioner on those three

shipments were respectively $1230.25, $1185.75 and $1592.25. (See protests R. 15, R. 19 and R. 21.)

As we have seen also the Customs officials continued to ignore the written protest of petitioner as set forth in the letter of May 13th, 1936 (R. 71) and continued to demand that entries made after that date be set up on the basis of the supposed foreign market value. Under the decision of the Court in the case of *Hecht* v. *Malley*, 276 Fed. 830, it was not necessary for the petitioner to personally interview and have a repetition of the heated argument with the Customs officials that took place with reference to the April shipment in order to have the benefit of the law on the subject of making entries under duress. The Customs officials knew the position taken by the petitioner at the outset and afterwards they received the letter of May 13th, and showed no signs of relenting from the position which they initially took with regard to the April shipment.

It may be noted also that Section 503(b) of the Tariff Act did not impose any duty on the petitioner as importer to make any duress certificate with regard to shipments entered subsequent to June 23rd, 1936, for the purpose of neutralizing the arbitrary conduct of the Customs officials theretofore demonstrated.

Section 503(a) of the Tariff Act makes the "entered value" binding on the importer if same is the "higher value" upon the theory of estoppel. But before the doctrine of estoppel can operate the "entered value" must have been voluntary and must have been made by the importer with knowledge of facts which would have enabled him to avoid the effect thereof. Furthermore the Customs officials must have been misled by such entry and must have acted thereon to their prejudice. Such are the well recognized elements of estoppel defined in Pomeroy's Equity Jurisprudence, 4th Edition, Section 805. Here the entries were

not voluntary. On the contrary they were made under duress. The importer knew of no pending case. Neither did the Customs officials. The Customs officials acted arbitrarily and in the face of the letter of May 13th (R. 71). They were not misled nor prejudiced by any act of petitioner.

An entry under duress is in law no entry and has no binding force on the importer. *Matter of Kridel*, Treas. Dec. 37209, *Erhardt* v. *Winter*, 92 Fed. 918, 25 C. J. C., page 253.

Duress, like fraud, vitiates everything it touches. Duress vitiates "entered value." *Maxwell* v. *Griswold*, 10 How. 242. Likewise

> "A release executed under duress is void or voidable."

45 Am. Jur. 690. *Ingram* v. *Lewis*, (10 C. C. A.) 37 F. (2d) 259, 70 A. L. R. 702, certiorari denied 282 U. S. 842.

> "If payment is made under implied duress as well as under protest the right of recovery is unquestionable."

61 C. J. 993. A taxpayer's waiver procured by duress is not binding. *Pictorial Printing Co.* v. *Com. Internal Rev.*, (7 C. C. A.) 38 F. (2d) 563. *Panther Rubber Mfg. Co.* v. *Com. Internal Rev.*, (1 C. C. A.) 45 F. (2d) 314.

The Customs Court, speaking through Judge Keefe (R. 66 to 69) determined that there was no foreign market value applicable to these importations. That the export values or invoice values were the only legal values. The Customs Court, Third Division, found (R. 83-84) that the entries as made were the result of moral duress imposed by the Customs officials. When those two elements were combined—illegality plus duress—the "entered value" no longer existed for any enforceable purpose. They were as if canceled by decree in equity on account of illegality and duress, yet both courts below held that the "entered values" were

still alive and binding on petitioner to the exclusion of the correct invoice values tendered and insisted upon at the time the entries severally were made.

Point III—The Customs Court had ample authority under Section 514 and related portions of the Tariff Act to order a reliquidation of the six entries in question on the basis of the legal and correct invoice values.

The Court of Customs and Patent Appeals by the last two pages of its opinion held that neither the Customs Court nor the Court of Customs and Patent Appeals was vested with equity powers. The court seemed to be of the view that "entered values" must stand and be in force unless canceled by some other court having equity powers and that the Customs Court was so limited in authority that no correction or reliquidation could be authorized on the legal invoice basis.

Such a construction of the Tariff Act of 1930 is contrary to the four decisions cited and quoted on the last three pages of the foregoing petition, beginning with the *Riccomini* case, 69 F. (2d) 480, to and including the *Moss Company* case, 103 F. (2d) 395. The opinion of Judge Parker in the *Moss Company* case quoted on the last page of the foregoing petition fully sustains our contention as to the scope of the authority and power of the Customs Court.

Under the old law petitioner could have recovered the illegal exactions here in question by a suit at law against the Collector filed in the United States District Court. In lieu of that remedy Congress next passed the Customs Administrative Act vesting broad powers in a Board of General Appraisers. The provisions of that law were superseded by the Act of 1922 and further superseded by the Act of June 17th, 1930, whereby the United States Customs Court and the United States Court of Customs and Patent Appeals were created as judicial tribunals to have complete

and exclusive jurisdiction regarding matters arising under the Customs Laws. As held by Circuit Judge Parker in two of the cases cited in the latter part of the foregoing petition, Congress by the Act of 1930 set up a

> "complete system of corrective justice for the administration of the customs laws."

and made the jurisdiction of the Customs courts exclusive in that behalf.

We therefore submit that there was no lack of power in the courts below to give petitioner the relief which it demanded by the protests which were duly filed as now set out, pages 14 to 31 of the Record. Both of the courts below readily conceded the justice of petitioner's demands but refused relief on the supposed ground of want of power so to do.

We now respectfully submit that the matters aforesaid amply warrant the issuance of writ of certiorari and petitioner humbly prays that the same may be issued to the end that the decision and judgment of the Court of Customs and Patent Appeals may be reviewed and reversed.

Louis Kurz,
Consolidated Building,
Jacksonville, Florida;
Thos. B. Adams,
1006 Bisbee Building,
Jacksonville, Florida,
Attorneys for Petitioner.

ADDENDA.

In further support of Point I of the foregoing brief, page —— supra, we cite the last sentence of Sec. 1501, 19 U. S. C. A., which reads as follows:

"The decision of the United States Customs Court shall be final and conclusive upon all parties unless an appeal shall be taken by either party to the Court of Customs and Patent Appeals *upon a question or questions of law only* within the time and in the manner provided by section 310 of Title 28." (Italics ours.)

The same language was retained when that section was amended by Act of June 25th, 1938 (see cumulative pocket supplement 19 U. S. C. A., Sec. 1501). In the case of *U. S.* v. *Collin & Gissel*, 123 Fed. 2d 147, the Court of Customs and Patent Appeals conceded the statutory rule binding upon that Court. Nevertheless the rule was not observed in the instant case.

In further support of Point II of the foregoing brief, stated page — supra, and to be regarded as inserted just prior to Point III of the foregoing brief, page — supra, we cite first: Section 402 (a) (1) of the Tariff Act of 1930, now 19 U. S. C. A., Section 1402 (a) (1) reading:

"(a) For the purposes of this chapter the value of imported merchandise shall be—(1) the foreign value or the export value, whichever is higher."

This has been construed to mean that where there is no "foreign value" then only the "export value" can be considered as the dutiable value. *U. S.* v. *Wiener*, 15 C. C. A. 428. Likewise if, on account of duress and no "foreign market value", there was no enforceable "entered value" such as contemplated by Section 503 (a) of the Tariff Act, 19 U. S. C. A. 1503 (a), then only the export or invoice value can be considered as the correct dutiable value for purposes of liquidation or reliquidation under court order.

We also cite in support of Point II supra, the case of *Hoeninghaus* v. *U. S.*, 172 U. S. 622, 627, 43 L. Ed. 576, 578, last half first column, and *Daloz* v. *U. S.*, 171 Fed. 275. In

the *Hoeninghaus* case this Court emphasized the point that the burden and duty rests upon the importer to carefully ascertain the correct dutiable value and then make an entry accordingly. This Court also observed that the statutes then in force took care

"to relieve an importer from a hasty and ill-considered valuation contained in the invoice by giving him an opportunity to raise such valuation by *voluntarily* making such addition thereto as to bring the same to the actual market value." (Italics ours.)

Thus it has been determined by this Court that an "entered value" has no binding force for any purpose if it be not "voluntarily" made by the importer. The *Daloz* case supra called attention again to the duty resting upon the importer to ascertain and make his entry according to a true dutiable valuation. The importer voluntarily made a mistake and because the mistake was *voluntarily* made no relief was given. By the petition for review of the decision of the Board of General Appraisers then performing functions now performed by the Customs Court, the importer alleged not only mistake but claimed the entry was made under duress. The decision of the Board said:

"No testimony was submitted to show duress."

Had duress been shown before the Board as was shown before the Customs Court here, the importer would undoubtedly have been given relief. At least such is the intimation from the opinion of Circuit Judge Colt who rendered the decision on appeal.

If Section 503 (a) of the Tariff Act can be construed as was done in the courts below, to make the "entered value" binding, although made under duress and not by the voluntary action of the importer, then the Act will at once become an instrument of oppression and spoliation of property. Congress did not so intend.